

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH A. BOYD,

Defendant-Appellant.

UNPUBLISHED

January 30, 2007

No. 262520

Muskegon Circuit Court

LC No. 04-050266-FH

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of fraudulent use of builder’s contract trust funds, MCL 570.152; embezzlement, MCL 750.174(5)(a); and encumbering real property without lawful cause, MCL 600.2907a(2). We affirm.

I

Defendant first asserts on appeal that he was denied his right to a speedy trial. Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. Whether a defendant has been denied his constitutional right to a speedy trial is an issue of constitutional law we review de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). This Court reviews the trial court’s factual findings for clear error. *Id.* “The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant’s arrest.” *Id.* at 261. A defendant’s right to a speedy trial “is not violated after a fixed number of days.” *Id.* Rather, “[i]n determining whether a defendant has been denied the right to a speedy trial, we balance the following four factors” set forth in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed2d 101 (1972): “(1) the length of delay, (2) the reason for delay, (3) the defendant’s assertion of the right, and (4) the prejudice to the defendant.” *Williams*, *supra* at 261-262 (other citations omitted). Where the delay is less than eighteen months, the defendant must establish prejudice resulting from the delay. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972).

In the instant case, defendant was first arrested on March 26, 2004. Trial was initially scheduled for August 18, 2004, but was adjourned to February 1, 2005, because the trial court was conducting a trial in another case. Defendant subsequently made a formal demand for a speedy trial on September 29, 2004. The February 1, 2005 trial date remained as the set date, but

it was eventually adjourned at the prosecutor's request. Defendant's trial actually commenced on March 8, 2005.

On February 14, 2005, defendant moved to dismiss the charges against him, claiming that he was denied his right to a speedy trial. Defendant asserted that the eleven-month delay in bringing him to trial prejudiced him by preventing him from leading a normal life because of community suspicion and his own anxiety, which in turn resulted in the cessation of his business, the denial of meaningful employment, the end of his marriage, an inability to seek custody of his children, and a financial inability to see a dentist to remedy dental problems. The trial court denied defendant's motion to dismiss, finding that defendant failed to establish prejudice sufficient to warrant dismissal.

Addressing the four factors, we first find that the length of time between defendant's arrest and the commencement of his trial was less than twelve months. Therefore, defendant is required to establish that he was prejudiced by this delay. *Collins, supra* at 695. Second, we consider the reasons for the delay. *Williams, supra* at 261-262. We examine each period of delay separately and attribute it to either the prosecutor or defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). The initial delay in bringing defendant to trial, from August 18, 2004 until February 1, 2005, was caused by the trial court's docket congestion. We give this delay, although technically chargeable to the prosecution, a neutral tint and assign it only minimal weight. *Williams, supra* at 263. The second period of delay, from February 1, 2005 until March 8, 2005, was requested by the prosecution. The prosecution requested the delay based on the nature of the case, which "involve[d] a complex assembly of business records, billings, payment records, etc." This delay was clearly attributable to the prosecutor. Thus, all delay is attributable to the prosecution, but only five weeks of that delay carries considerable weight in the balancing test.

With regard to the third factor, there is no dispute that defendant asserted his right to a speedy trial on September 29, 2004, approximately six months after he was arrested. *Williams, supra*.

Lastly, we consider whether defendant was prejudiced by the delay. "There are two types of prejudice: prejudice to the person and prejudice to the defense." *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997). "Prejudice to the defense is the more serious concern, 'because the inability of a defendant to adequately prepare his case skews the fairness of the entire system.'" *Williams, supra* at 264. Defendant does not argue that his defense was prejudiced by the delay. Rather, he argues significant prejudice to his person. We note that defendant was not incarcerated during his delay, other than for a total of four days immediately following his arrests. While defendant asserts that he suffered mental anxiety and was burdened financially as a result of the charges pending against him, the trial court correctly noted that defendant's anxiety was no different from that suffered by most defendants free on bond while facing felony charges. Anxiety alone is insufficient to establish a violation of defendant's right to a speedy trial, and general allegations of prejudice such as financial burdens are also insufficient to establish a violation thereof. *Gilmore, supra* at 462. Upon balancing the *Barker* factors to the speedy trial issue, we conclude that dismissal of the charges against defendant was not warranted in this case.

Defendant also asserts that the trial court violated his constitutional right to present a defense by prohibiting him from introducing evidence that the Hansons, for whom he was building a log home, breached the underlying construction contract with defendant. We disagree.

Before trial, the prosecutor moved in limine to preclude defendant from arguing that any alleged breach of the contract by the Hansons constituted a defense to the charge involving the builders contract trust fund. The trial court granted the motion and excluded any references that the Hansons may have breached their contract with the defendant. The trial court explained that breach of contract by a purchaser is not a defense to a criminal charge under the builders trust fund act, and therefore, regardless of whether the Hansons breached their contract with defendant, defendant was required by statute to hold any advances received on behalf of the Hansons in trust until completion of the project; defendant was prohibited from appropriating any of these funds for his own use until all future costs were provided for to complete the project.

Defendant argues that the trial court's ruling prevented him from negating the element of intent. He explains that his position at trial was that he never intended to defraud the Hansons. Instead, he believed that he acted justifiably in taking a profit and stopping work on the project because the Hansons breached the contract. Defendant asserts that had he been allowed to argue that his conduct was justifiable in light of the Hansons' breach, the jury may have believed that defendant lacked the mens rea necessary for conviction on each of the charges against him.

Based on our review of the record, we find that, regardless of the trial court's pretrial ruling, defendant presented evidence that he stopped working on the Hansons' home because they breached their contract with him by refusing to sign change orders or to pay for "extras" they received. Defendant presented evidence of the change orders underlying defendant's argument, over the prosecutor's objection, and the Hansons each acknowledged that they refused to pay the additional charges reflected therein. Defendant testified about the change orders and explained that he stopped working on the project out of frustration because the Hansons unreasonably refused to pay for the changes, the "extras," they requested and received. In closing argument, defense counsel argued that the Hansons refused to meet their obligations to pay defendant for the "extras" they had requested and that, as a result, defendant ceased working on the project. In sum, defendant was allowed to present testimony and argument that the Hansons did not abide by the parties' agreement and owed defendant money resulting from changes to the project, as set forth in various change orders. We therefore reject defendant's argument that he was denied the opportunity to present this defense to the jury.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jane E. Markey